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In The

Supreme Court of the United States

October Term, 1994

BABY "RICHARD", also known as BABY BOY JANIKOVA, a minor, by his guardian *ad litem*, Edward J. O'Connell, and

JOHN and JANE DOE, Husband and Wife, Adoptive parents of Baby Richard,

Petitioners,

vs.

OTAKAR KIRCHNER, Biological father of Baby Richard,

Respondent.

Petition For Writ Of Certiorari To The Illinois Supreme Court

REPLY BRIEF OF THE PETITIONER, BABY RICHARD

EDWARD J. O'CONNELL, Petitioner
Guardian *Ad Litem* for Baby Richard

PATRICK THOMAS MURPHY,
Cook County Public Guardian
Counsel of Record for Petitioner

Of Counsel:
LEE ANN LOWDER
KASS A. PLAIN
Office of the Cook County Public Guardian
1112 South Oakley Boulevard
Chicago, Illinois 60612
(312) 633-2500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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REPLY BRIEF OF THE PETITIONER, BABY RICHARD

On September 20, 1994, the Petitioner received the Brief of Respondent, Otakar Kirchner, in Opposition to Certiorari ("Brief in Opposition"). On September 30, 1994, the Petitioner received Mr. Kirchner's Supplemental Brief, which was filed in response to the Brief of the *Amicus Curiae*, Jim Edgar, Governor of Illinois, in support of the Petition for Certiorari. Respondent's briefs contain issues which were not addressed in the petition for writ of certiorari. Petitioner, Edward O'Connell, as guardian *ad litem* for Baby Richard, submits this Supplemental Brief pursuant to Supreme Court Rule 15.6, to address these new issues.

ARGUMENT

1. Respondent claims that this Court lacks jurisdiction to grant the petition for certiorari because the issue of Richard's custody has never been presented to or finally decided by the Illinois courts. (Brief in Opposition, pp. i, 5, 12-14). This assertion is without merit for several reasons. First, it ignores the fact that the Illinois Supreme Court reversed the decision of the Illinois Appellate Court, which had held that it is in Richard's best interest to remain in the custody of his adoptive parents. In recognition of Richard's interest, the appellate majority stated that Richard "is not a piece of property belonging to either his biological or adoptive parents." The court reasoned that because the child is the real party in interest in an adoption, custody or abuse proceeding, "it is his

best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents." (Petition for Writ of Certiorari, Appendix at 24-25).[1]

The Illinois Supreme Court majority rejected the appellate court's reasoning that Richard has a cognizable interest in maintaining his adoptive family relationship. Delivering the opinion of the court, Justice Heiple stated that Illinois adoption laws "are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." (App. at 3-4).

This statement by the Illinois Supreme Court majority belies Respondent's assertion that the Illinois Supreme Court has not ruled against Richard's liberty interest in remaining in the custody of his adoptive parents. It supports Richard's assertion that the Illinois Supreme Court completely ignored his interest, wholly separate from that of his biological parents and his adoptive parents, in maintaining his filial relationship with the only family he has ever known.

In his decision in support of the denial of rehearing, Justice Heiple clearly articulated his expectation that Richard would be placed in the custody of his biological parents as a result of the Illinois Supreme Court decision, which he authored. Justice Heiple explained that three-year-old Richard would face an "initial shock", even a longing for his adoptive parents after he is removed from

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[1] Subsequent citations to the Appendix to the Petition for Writ of Certiorari will be designated as "App. ___."

their custody. According to Justice Heiple, however, "[i]t will not be an insurmountable trauma for a three-year-old child to be returned, at last, to his natural parents who want to raise him as their own." (App. 73).

Justice Freeman, specially concurring in the denial of the petition for rehearing, also explained that he expected Richard to be placed in the custody of his biological parents as a result of the Illinois Supreme Court decision. He referred to the "emotionally difficult transition for this child." (App. 76). He also opined that no purpose would be served by rehearing because it would cause further delay, and that

> [s]uch delay can only serve to increase the difficulty already attendant the pending separation of this youngster from his adoptive parents. Equally as important a concern, however, is the avoidance of any unnecessary delay in the unification of this child and his natural parents and his assimilation process into his birth family.

(App. 77).

Respondent asserts, on the one hand, that "nothing in the decision of the Illinois Supreme Court or in Illinois law" precludes Richard's adoptive parents from filing a new action seeking a custody hearing based on a best interest standard under the Illinois Marriage and Dissolution of Marriage Act ("IMDMA") (Brief in Opposition at 12). On the other hand, and on the very next page, Respondent challenges the adoptive parents' standing to file a custody action under the IMDMA. Respondent also challenges the constitutionality of legislation passed while the petition for rehearing in this case was pending in the Illinois Supreme Court, mandating a best interest

hearing whenever an adoption order is vacated. (*Id.* at 13). Moreover, Respondent asserts that "the interests of non-family members in relationships with children are subordinate to the constitutionally-protected relationship between a child and a fit parent." (*Id.* at 15). It is disingenuous for Respondent to assert that this Court lacks jurisdiction in this case because Illinois law does not preclude a best interest hearing, then to assert that the adoptive parents may not have standing to seek such a hearing, then to assert that the Constitution forecloses such a hearing.

In *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989), this Court explained that it has "never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." The Illinois Supreme Court clearly rejected the appellate court's assertion that Richard possesses such an interest. In his petition for writ of certiorari, Richard asked this Court to recognize, as a matter of federal constitutional law, that he has a cognizable liberty interest in the family relationship he has developed over the last three and a half years with his adoptive parents and brother.

2. Respondent also claims that this Court lacks jurisdiction to review the Illinois Supreme Court's decision because it is based solely on that court's interpretation of state law. (Brief in Opposition at 8-11). Respondent claims that Justice Heiple, who wrote an opinion in support of the denial of rehearing, did not write for the majority of the Illinois Supreme Court. (*Id.* at 5, 20, n.7). However, only Justice Freeman wrote a separate, specially concurring opinion in the denial of the

petition for rehearing. (App. 76). Two justices dissented from the denial of rehearing. (App. 74-75). Thus, five justices, including Justices Heiple and Freeman, voted to deny rehearing. It is logical to conclude that, at a minimum, Justice Heiple's second opinion reflects the legal basis for the June 16, 1994 opinion, which contained no case citations. (App. 1-4).[2]

In support of the denial of rehearing, Justice Heiple explained that Illinois courts are bound by this Court's decision in *Stanley v. Illinois*, 405 U.S. 645 (1972), to treat unmarried fathers the same as unmarried mothers when determining their rights to child custody. (App. 68). As his second basis for seeking certiorari, Richard explained that the Illinois Supreme Court had misinterpreted *Stanley* and ignored its progeny. (Petition at 22-29). Because the Illinois Supreme Court's decision is based upon an erroneous interpretation of federal law, this Court has jurisdiction to grant the writ.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court granted certiorari because a state supreme court relied on an erroneous interpretation of a federal case, even though the state court also explained that its decision was based on the state constitution. This Court explained that where

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[2] Moreover, Respondent's assertion that Justice Heiple does not speak for the majority of the Illinois Supreme Court in his opinion in support of the denial of rehearing is inconsistent with his own reliance on the facts contained in the appellate dissenting opinion. (Brief in Opposition at 2, 5). The Illinois Supreme Court's first opinion makes no reference to the appellate dissent. The only reference to the dissenting opinion is contained in Justice Heiple's opinion in support of the denial of rehearing. (App. 68).

a state court is relying on federal precedents solely for purposes of guidance, it need only make this clear by a plain statement in its judgment or opinion. If, however, the state court ruling is based on federal precedent which compels the result the state court has reached, then an adequate and independent state ground cannot prevent the United State's Supreme Court from asserting jurisdiction. *Id.* at 1041-42. Here, even if the Illinois Supreme Court's decision were based on an independent state ground, as Respondent claims, the court's reliance on an incorrect interpretation of federal law presents a justiciable federal issue. Justice Heiple's assertion that Illinois courts are bound by his mistaken interpretation of *Stanley* raises a federal issue, which this Court has jurisdiction to correct.

3. Respondent next claims that this Court should decline jurisdiction in deference to state interests in the area of familial relationships. This assertion ignores the fact that this Court has articulated the parameters of biological parents' due process and equal protection rights with regard to the custody of their children in a number of cases, many of which are cited by Respondent. *See, e.g., Stanley v. Illinois,* 405 U.S. 645 (1972) (Brief in Opposition at 15, 20, 21), *Lehr v. Robertson,* 463 U.S. 248 (1983), and *Michael H. v. Gerald D.,* 491 U.S. 110 (1989) (*Id.* at 21, 23), and *Quilloin v. Walcott,* 434 U.S. 246 (1978) (*Id.* at 16, 21, 23).

This Court summarized its decisions which hold that the Federal Constitution superseded state law in *Lehr v. Robertson,* 463 U.S. 248, 258-262 (1983). The Court in *Lehr* then concluded that its decisions teach that "the significance of the biological connection is that it offers the

natural father an opportunity that no other male possesses to develop a relationship with his offspring. . . . If he fails to [grasp that opportunity], the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 261-262. Mr. Kirchner failed to grasp his opportunity to develop a relationship with Richard by marrying Richard's mother or filing a paternity action within the first 30 days after Richard's birth. Thus, the Illinois Supreme Court erred when it suggested that this Court's decisions give Mr. Kirchner preemptive rights to Richard's custody.

4. Finally, Respondent erroneously claims that the ruling in *DeBoer by Darrow v. DeBoer,* 114 S. Ct. 1 (1993), precludes Richard from claiming a constitutionally protected liberty interest in his relationship with his adoptive family.[3] (Brief in Opposition at 16-18). In fact, *DeBoer* is both factually and legally distinguishable from Richard's case. From the outset, *DeBoer* dealt with the custody, not the adoption of a child. *See In Re Baby Girl Clausen,* 442 Mich. 648, 502 N.W.2d 649 (1993). As Respondent admits, the Does obtained an adoption order from the Circuit Court of Cook County, and that adoption was affirmed by the Illinois Appellate Court. (Brief in Opposition at 17-18). It is Richard's liberty interest in this state-

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[3] It is important to note that Justice Blackmun, joined by Justice O'Connor, dissented from the denial of the application for stay presented to the full court. *DeBoer by Darrow v. DeBoer,* 114 S. Ct. 11 (1993) (mem.). Justice Blackmun explained, "I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk." He also noted that various state courts are in fundamental disagreement regarding their duty and authority to consider the best interests of children in custody proceedings. *Id.* at 11-12.

sanctioned adoption which he asks this Court to recognize in his petition.

In addition, one of the main issues in the *DeBoer* case was the enforcement of an Iowa judgment by the Michigan courts under the Uniform Child Custody Jurisdiction Act and the federal Parental Kidnapping Prevention Act. 114 S. Ct. 1, 2; *see also Clausen*, 442 Mich. 648, 502 N.W.2d 649. Neither of these laws is at issue in the instant case. Moreover, Justice Stevens expressed concern that the custodians in *DeBoer* did not appeal the Iowa Supreme Court decision, but instead sought a modification of that judgment in the Michigan courts. *DeBoer*, 114 S. Ct. at 2. Here, there is no suggestion that the adoptive parents have engaged in any attempt at forum shopping. Contrary to Respondent's claim then, this Court's refusal to grant a stay in *DeBoer* does not preclude Richard from asserting a constitutionally protected liberty interest in maintaining his filial relationship with the only family he has ever known.

CONCLUSION

For the foregoing reasons, Petitioner Edward J. O'Connell, on behalf of Baby Richard, respectfully requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

PATRICK THOMAS MURPHY
Cook County Public Guardian
Counsel for Petitioner,
Edward J. O'Connell, as
Guardian ad Litem for
Baby Richard